



DEPARTMENT OF ENVIRONMENTAL PROTECTION

DEPARTMENT-WIDE MONETARY PENALTY CALCULATION GUIDANCE

1. **PURPOSE.** The State of Maine Legislature has established an environmental protection system that provides the Department of Environmental Protection (DEP) with authority to take enforcement actions that result in written binding resolutions which include monetary penalties. All DEP programs are required to assess penalties that adequately reflect the nature of the underlying violation and that are sufficient to act as a deterrent to future violations as determined within the circumstances of a given case. This Monetary Penalty Calculation Guidance (MPCG) document provides guidance on applying criteria essential to determining a penalty and prescribes the model for each DEP enforcement program to follow when establishing monetary penalty calculation guidance. The MPCG provides the guiding principles on which each program must further describe the circumstances and considerations specific to its operations. Implementation of the MPCG at the program level must include a procedure for adequately documenting the assessment of relevant factors when calculating a penalty.
2. **APPLICABILITY.** The MPCG details guiding principles for calculation of civil monetary penalties that will be proposed as part of administrative and court resolutions. Monetary penalties proposed or agreed to as part of a judicial resolution, as a matter of equity for parties negotiating administrative settlements in good faith, will typically be significantly higher than amounts calculated pursuant to administrative procedures.
3. **REFERENCES.**
 - A. 38 M.R.S.A. § 349
 - B. Board of Environmental Protection Consent Agreement Policy (as amended 1/10/90)
4. **PENALTY ASSESSMENT GOALS.**
 - A. To have the direct effect of deterring individuals from repeating violations of Maine's environmental laws;
 - B. To have the indirect effect of providing general deterrence against violations of Maine environmental laws when the monetary consequences of environmental law violations are observed by others;
 - C. To remove any competitive business advantage derived from non-compliance.
5. **DEFINITIONS**
 - A. **Injury.** The term *injury* means an observable or measurable adverse change in human health or a natural resource, or impairment of human health or a natural resource. Injury may occur directly or indirectly, and incorporates the concepts of "destruction," "loss" and "loss of use."
 - B. **Extensively Regulated Enterprise.** The term *Extensively Regulated Enterprise (ERE)* refers to entities engaging in activities extensively regulated by State and federal government, including regulation under environmental laws.
 - C. **Written Binding Resolution.** The term *written binding resolution* refers to enforceable administrative, and judicially approved or ordered, documents used by DEP and the Department of the Attorney General (AG) to resolve violations.



6. PER DIEM PENALTIES. In the context of an administrative settlement, *per diem* penalties are applied at the discretion of DEP because the statutory minimum *per diem* requirement is only mandatory in court. The objective of the *per diem* approach to calculating violations is to provide an incentive for the regulated universe to quickly and effectively address environmental violations and environmental harm. The *per diem* approach should be utilized in matters that involve multiple occurrences of a violation, violations with a long duration, or for violations that result in long-term or ongoing environmental harm.

7. CALCULATION METHOD. The total penalty included in a resolution must consider the following elements.

A. Establishing a Punitive Base Penalty. A fundamental aspect of the system established by the MPCG is normalization of punitive penalties using a defined set of considerations that are individually rated to reflect the magnitude of the situation. The system contains two stages: (1) an evaluation of the environmental aspects of a case and, (2) an evaluation of the circumstances in which the violation occurred. An evaluation must be performed, and ratings applied, individually to each violation documented and planned for inclusion in a proposed resolution.

1) ENVIRONMENTAL & PUBLIC HEALTH ASPECTS

a) Area Sensitivity. Each program must identify factors for determining the environmental sensitivity of the location where the violation occurred. This criterion is limited to considerations regarding the area threatened or affected by the violations. Determining the area where threats are involved, rather than actual effects, requires one to be mindful of the size of the threat and how far it could likely spread. These factors likely will be identified by characterizations of the physical characteristics of locations encountered by the program, ranked to account for those more sensitive to environmental harm than others. Categories are likely to range from "low sensitivity" to "high sensitivity", with the possibility that this category receives no points because area sensitivity is not applicable to the situation.

b) Area Size. When, as the result of a violation, the potential to impact a protected natural resource exists, or when a protected natural resource is threatened or affected, the size of the physical location at issue is evaluated. Determining the size likely requires evaluation of a variety of facts, including the volume of pollutants involved, the nature of the geographic location, and the conditions under which a release occurred or would occur, if threatened. The size likely will be defined by general characterizations, ranked to account for distinctions between "threatened" situations and actual release situations. Categories are likely to range from "very small confined area" to "documented pollution effects to large area beyond immediate location of violation."

c) Environmental Injury/Damage. The extent to which potential or actual environmental injury exists will be rated. Such categories are likely to range among "small remediable amount" to "small long-term effects" to large injury situations. Also, this criterion may in whole not apply to certain programs, or a "not applicable" category may exist in a rating system to account for any particular case.

d) Duration. All violations will exist for some period of time. The measure of duration aims at identifying or estimating for how long a violation existed. The sole



factor considered under this criterion is how long the violation continued or has been continuing. This consideration of duration is also separate from cases that warrant assessment of a penalty for each day a violation existed. See MPCG § 6. The purpose of this criterion is an objective evaluation of duration, simply in terms of time periods important to a program. The “duration” will likely be defined in bands of time. Such point categories likely range between “less than 24 hours” and “greater than one-year.”

- e) **Activity Type.** Most DEP programs regulate a variety of pollutants as well as activities. In cases where activities are most or equally relevant to the pollutants involved in the violations at issue, they likely range in terms of severity of threats, or terms of deviation from normal accepted practices in a field. Categories under this criterion likely range between “acceptable activity” to “strictly prohibited activity in long-established program.”
- f) **Degree of Deviation From Standards.** All violations involve a deviation from environmental requirements. This deviation may be in the form of pollutant releases in excess of limits, or volume of material inappropriately managed. This criterion does not include consideration of “duration” since it is a separate criterion.
- g) **Human Health Considerations.** To the extent that there is potential to affect human health, or where human health effects are threatened or documented, they will be rated. Such categories are likely to consider differences between threats and effects, and range among “minor chronic effect” to “minor acute effect” to large injury situations. Also, this category may in whole not apply to certain programs, or a “not applicable” category may exist in a rating system to account for any particular case.
- h) **Pollutant Type.** Most DEP programs regulate a variety of pollutants as well as activities. As such, the pollutants involved in a case typically influence environmental and human health significance. This criterion aims to distinguish among pollutant characteristics that pose greater or lesser risks to human health and the environment. Categories under this criterion, for example when chemicals are involved, likely range between “non-toxic” and “known carcinogen.”

2) CIRCUMSTANCES RATING.

- a) **Knowledge of Laws.** The State expects individuals and businesses to be knowledgeable of the laws governing their activities, and voluntarily act to ensure compliance. This being said, differences between most individuals and businesses as well as the maturity of a regulatory program, demand that distinctions be made based on reasonable expectations. When applying a rating in this category, consider the alleged violator's history with DEP and their professional background. The categories under this criterion likely range between “new program, unsophisticated individual violator” to “longstanding program requirement, highly sophisticated ERE.”
- b) **Foreseeability.** When evaluating a violation for this category, one is considering whether, as a matter of course, the violator could have avoided the issue and what is likely required to take those steps. Also relevant in this criterion are expectations of what the violator should have reasonably known given their situa-



tion. The categories under this criterion likely range between “all protective steps taken but failed for unforeseen reasons” to “issue addressed in license, no steps taken.”

- c) **Cause of Violation.** The circumstances surrounding a violation often play a significant, and at times intangible, role in affecting the perspective from which a case should be viewed. For example, a facility recently purchased out of bankruptcy and restarting may likely be viewed differently than a ERE that never provided employees with adequate training. This criterion is the opportunity for a program to define and appropriately assess the typical circumstance found surrounding violations.
- d) **Mitigation.** Most violations provide the opportunity for a violator, on their own, to immediately take action to mitigate any effects or ongoing threats to the environment or human health caused by the violation. This criterion is separate from *speed once notified* or *discovery method* since it evaluates self-initiated actions prior to being notified. This criterion also includes consideration of the role that safeguards in place prior to the violation had in promptly discovering or successfully mitigating the effects of the violation, such as operation or maintenance plans, and environmental management systems. The categories under this criterion likely range among “immediately upon discovery took corrective action” to “aware of the violation but no action taken” to “no effort made to evaluate compliance.”
- e) **Discovery Method.** The manner in which a violation gets discovered and documented influences the penalties appropriate in a case. Since voluntary compliance is expected, prompt self-reporting when not already required by law likely mitigates a penalty, but discovery by DEP will tend to aggravate penalties. The categories under this criterion likely ranges between “self-reported” to “significant information withheld.”
- f) **Restoration.** To the extent that environmental injury occurs, the ability and willingness to restore it once notified is the important factor in determining short-and long-term effects. The categories under this criterion likely ranges between “none required” to “action not taken where and when needed.”
- g) **Speed.** This criterion solely relates to the amount of time passing between discovery of a violation and critical actions taken to bring the situation into compliance relative to how long the actions should reasonably take to complete given the factual circumstances of the case. When evaluating a violation for this category, consider how quickly the violator acted on a violation by self-reporting, and correcting or abating the violation. The categories under this criterion likely range between “not subject by policy to enforcement forbearance, but promptly self-reported and corrective actions immediately initiated or completed” to “no action taken.”
- h) **Quality.** This criterion rates the sufficiency of the corrective action taken to obtain compliance. The quality likely ranges from “low, requires additional compliance conditions in resolution” to “superior, well beyond requirements.”
- i) **Potential for Recurrence.** This criterion mitigates or aggravates a penalty based on the situation in which the violator places themselves going forward. Violators in a business without a systematic approach to compliance are typically



in a weaker position for maintaining compliance than one with a system and staff in place. Likewise, an individual performing a one-time project has a much lower risk of recurrence.

- j) **Cooperation.** The response from, and ongoing actions of, a violator once informed of a compliance issue plays a fundamental role in how all other criteria are resolved. The State places high value on positive relationships receptive to resolution, rather than confrontation.
- k) **Compliance History.** An individual's or entity's overall compliance record with all environmental requirements is an aggravating or mitigating factor in establishing a penalty. This category is in addition to final penalty adjustments for repeated violations made pursuant to DEP's statutory authorities. See 38 M.R.S.A. § 349. Although it may be obvious that a poor environmental compliance record should aggravate a penalty, it is also important to recognize an exemplary compliance record as an appropriate mitigating factor. The point categories under this criterion likely include "excellent compliance record in all areas", "questionable compliance record in another program" to "repeat of multiple adjudicated violations in multiple programs with insufficient corrective action."

B. GLOBAL ADJUSTMENT FACTORS.

- 1) **Violator Adjustment.** Recognizing that the DEP prosecutes enforcement actions against different types of violators, the base penalty amount must be adjusted to ensure that the penalty acts as a sufficient deterrent to the violator. Different types or classes of violators have their own financial circumstances and these circumstances must be assessed in each case and the penalty adjusted in such a way that the deterrent effect is meaningful with respect to the violator's individual financial circumstances.
- 2) **Repeat Violations Adjustment.** DEP's maximum \$10,000 per day penalty may be increased up to \$25,000 where there has been a previous violation of the same law by the same party within the five preceding years. See 38 M.R.S.A. § 349(6). This adjustment will be implemented considering each prior violation of the same law by the same party that was resolved in a written binding resolution.
- 3) **Financial Gain.** Any identifiable financial gain to a violator as a result of their non-compliance must be calculated. Financial gain may be in the form of avoided cost, economic benefit, or ill gotten gains. Financial gain is calculated as a penalty line-item in addition to the punitive portion of the penalty. Where financial gain exceeds statutory maximum penalties, the total penalty may exceed the statutory maximum up to an amount that is twice the benefit. See 38 M.R.S.A. § 349(8). Some examples of financial gain include: increased property values; avoided operation and maintenance costs (labor, power, chemicals); avoided disposal or testing costs; avoided consulting/application/license fees; avoided capital costs; avoided user charges; and additional profits during the time of non-compliance. Avoided cost is the actual dollar amount of costs that were avoided and which will not be paid at any time (e.g. a violator disposes of hazardous waste at an unlicensed facility and avoids the costs of proper disposal). Economic benefit exists where costs were delayed rather than avoided entirely (e.g. a violator fails to install pollution control equipment that costs \$100,000 to install but is required to install the equipment as part of an enforcement resolution). In the case of economic benefit, the amount should be calcu-



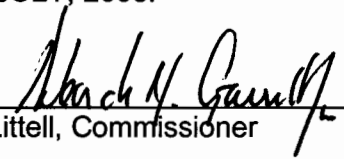
lated using the automated tool developed by U.S. Environmental Protection Agency, known as BEN. When impractical, other equally reliable means of determining economic benefit may be substituted. Ill gotten gains result from a violator enjoying profits that would not have been realized if the violator had complied with the law (e.g. a gravel pit operator mines gravel that should not have been mined and realizes profits from the sale of the gravel). Often the calculation of financial gain must be estimated based on the best information available to a case manager at the time a proposed resolution is being prepared. As with any other factual information, estimated amounts are open to adjustment based on verifiable cost information supplied by the violator.

- 4) **Ability to Pay.** The violator's ability to pay a penalty or a portion of a penalty may be considered only after the issue of ability to pay a proposed penalty is raised by the violator. Inability to pay must be based on documentable circumstances. Whenever possible, EPA's Abel, Munipay, or Indipay modeling should be used in assessing ability to pay. When impractical, other equally reliable means of determining ability to pay may be substituted. Consideration of inability to pay is completely within the discretion of the DEP, use of EPA modeling is intended only as a helpful guide. The result of EPA modeling is only one factor that should be considered when determining whether to waive or suspend a portion of a penalty. For example, less consideration should be given to inability to pay where there is a history of non-compliance or repeat violations.

8. **MULTIPLE VIOLATORS / SAME VIOLATION.** This penalty calculation guidance establishes a system that generates a specific penalty for a specific citation. The fact that several parties may share responsibility for a violation does not mean each party should be assessed the total amount individually. The total amount may be attributed to one party, or appropriately apportioned among the parties.

9. **PROSPECTIVE PREVENTIVE PENALTIES.** In resolutions that include the performance of significant corrective actions, preventative penalties typically will be included to allow a failure to act in good faith to be penalized. Prospective preventative penalties are typically in the form of stipulated or suspended penalties that will escalate as the amount of time out of compliance with a condition increases.

DONE AND DATED IN AUGUSTA THE 2nd DAY OF JULY, 2008.


David P. Littell, Commissioner

NOTE: THIS GUIDANCE DOCUMENT PROVIDES GENERAL GUIDELINES FOR THE DEP'S STANDARDIZED METHOD FOR CALCULATING CIVIL MONETARY PENALTIES PURSUANT TO 38 M.R.S.A. § 349-A. THESE GUIDELINES ARE NOT RULES AND ARE NOT INTENDED TO HAVE THE FORCE OF LAW. THIS GUIDANCE DOES NOT CREATE OR AFFECT ANY LEGAL RIGHTS OF ANY INDIVIDUAL, ALL OF WHICH ARE DETERMINED BY APPLICABLE STATUTES AND LAW.